BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in full in the record at page 432 and is reported in 117 Fed. (2nd) 672.

II.

JURISDICTION.

The jurisdictional statement will be found in the petition for the writ of certiorari at page 11 and is incorporated herein by reference.

III.

STATEMENT OF THE CASE.

The statement of the case, so far as is material to the questions here presented, will be found in the petition for the writ of certiorari under "Summary Statement of the Matter Involved," page 2, which is hereby incorporated herein by reference.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court.
2. In that it determined in effect that an instruction

that mere preponderance of the evidence was sufficient rather than a clear preponderance of the evidence.

3. In that it found that the Defendant could not plead and show that part of the decree entered in the Superior Court case which held that he had not been guilty of the same affirmative, deceitful acts and representations attributed to him in this case.

4. In holding that the Defendant could not plead and show in this case that the court in the Superior Court case held that the wards of Plaintiff-guardian were entitled to receive $8,000 out of the estate of McConnell and directed that the same be paid in due course of administration by the administratrix of his estate pending in the Probate Court of Cook County, said administratrix being a party defendant to the Superior Court case.

5. In holding that the Defendant could not plead and show in this case that in and by the decree entered in the Superior Court case the court found said Release was invalid and without any effect as to the rights of Plaintiff-guardian's wards by reason of the fact that the Release had not been approved and received the sanction of the Superior Court of Los Angeles which entered the decree of divorce which approved and incorporated the Property Settlement Agreement.

6. In that its opinion was tantamount to finding that the Defendant could not plead or show any of the matters or things that transpired in the Probate Court of Cook County in connection with the alleged claim filed by the Plaintiff in the Probate Court of Cook County.

7. In that it sustained the trial court in overruling the objections of the Defendant to certain instructions given by the Court and in refusing to give certain instructions requested by the Defendant.

8. In that the court found that the question of the legality or invalidity of the Release was immaterial.

9. In sustaining the ruling of the trial court in striking from the Defendant's Answer the written objections filed by the administratrix of the McConnell estate to the Plaintiff's claim in the Probate Court of Cook County and the ruling of the trial court denying the right to the Defendant to introduce in evidence certain objections filed to said claim.

10. In sustaining the ruling of the District Court, denying the Defendant's motion for a directed verdict on the grounds that the children were not injured by the Release for the reason the mother had no authority to release their rights; that as guardian, she could not release the claims and that all rights under the Agreement were merged in the decrees of divorce, any discharge of which would require approval by the court.

11. For the reason that the opinion of the court is tantamount to holding that the financial condition of McConnell between the date of the signing of the Property Settlement Agreement and his death was immaterial.

12. In that it arrived at an erroneous conclusion when it indicated in its opinion that the Defendant was complaining of the charge which was given at the request of the Defendant, said charge being as follows:

> As a matter of law, a guardian has no right to surrender, release, or cancel the claim of this ward or any of its wards against another person, for any sum of money whatsoever, without first the consent thereto of the court of jurisdiction over such guardian of said minors, and any release executed by such guardian of said minors without such consent is wholly void and invalid as a matter of law. (Par. 4, Tr. 369.)

instead of finding that the trial court had erred in sus-

taining the Plaintiff's motion to strike the portions of the Defendant's Answer contending that the Release was wholly void and of no legal effect, which said ruling of the trial court was erroneous and inconsistent with the proper theory of law set forth in the instruction.

13. In denying the Defendant's motion at the close of all the evidence to direct a verdict finding the Defendant not guilty.

14. In denying the Defendant's motion made subsequent to the jury's verdict for a new trial and for a directed verdict.

15. In denying the Defendant's motion for arrest of judgment.

16. In not recognizing and applying to this case the principle of law that where there are no exceptions as to a statement as to the law in the charge given to a jury by the trial court that such statement becomes the law of the case for purposes of appeal and the reviewing court must be governed thereby no exceptions having been taken by the parties to the case.

SUMMARY OF THE ARGUMENT.

I.

Plaintiff set up in her pleadings that she had filed a suit in the Superior Court of Cook County to have the release in question declared null and void, because of the fraud and deceit of this Defendant in procuring the same. The Superior Court found that the Defendant had not been guilty of the fraud and deceit attributed to him, being the same fraud and deceit attributed to him in this case, and found that the release in question was valid as to plaintiff as an individual but invalid as to the two minor children, wards of plaintiff-guardian herein, as it was not approved by the Superior Court of Los Angeles County, California, which entered the divorce decree and had jurisdiction of said children, and also found and decreed that out of the Estate of McConnell, pending in the Probate Court of Illinois, there should be paid to the children as the value of their claim under the property settlement agreement, the sum of $8,000. The trial court struck from Defendant's Answer all pleadings in reference to said findings of the Superior Court of Cook County and in the appeal to the Circuit Court of Appeals the Defendant assigned error thereon. The Circuit Court of Appeals sustained the rulings of the trial court and Defendant contends that said Court of Appeals should have reversed the trial court's rulings in that respect on the theory of *res judicata* and estoppel and on the theory that the plaintiff having obtained a judgment of $8,000 in favor of her two wards in the said Superior Court case, Defendant was entitled to plead that in this pro-

ceeding, even if it could be contended that the said children had suffered damage by reason of the release.

II.

The contention of Plaintiff throughout this litigation has been that by reason of alleged affirmative, deceitful representations of this Defendant she executed a release as a consequence of which she and her two wards suffered damages consisting of the loss of certain monthly payments provided to be made to them under the terms of a property settlement agreement, which damages the jury assessed, as to plaintiff-sole, at $4,000 and as to plaintiff-guardian, on behalf of her two minor wards, at $8,500. Defendant contended throughout the litigation that the release in question was invalid for certain stated reasons, and could in no way release any claim of the plaintiff as an individual or of her children, as minors, under said agreement or the divorce decree incorporating the same, and that if the release was not efficacious so to do on the date of its delivery to the Defendant, then neither plaintiff as an individual nor either of her wards could suffer any damages as a result thereof. Further, that if the release were valid, then the measure of plaintiff's damages was as set forth in the instruction of the court, namely, "the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, canceled, or released by plaintiff under the terms of the release in evidence, and the amount paid her under the evidence at the time of the execution of the release" (Tr. 374 "20").

The theory as to the measure of plaintiff's damages above set forth was recognized by all parties to the case, and the instruction above referred to became the law of the case. The Circuit Court of Appeals refused to recognize that this was the law of the case.

III.

The trial court erroneously permitted evidence of the filing of Plaintiff's claim in the Probate Court and its disallowance therein, over the objection of Defendant, to which the Defendant assigned error; and the Court of Appeals sustained the rulings of the trial court, when it clearly appears that the trial court considered that what transpired in the Probate Court was in fact immaterial and when it further appears that same was immaterial in view of the instruction given in respect to damages.

IV.

The Circuit Court of Appeals in effect found that the order of the Probate Court disallowing Plaintiff's alleged claim therein was predicated solely on the ground that the release was a bar thereto, when it appears from the evidence and under the law that irrespective of the interposition of said release the Probate Court would have had to enter such order.

V.

That the Circuit Court of Appeals should have sustained the position of Defendant that a higher degree of proof was required in a case of fraud and deceit than mere preponderance of evidence.

ARGUMENT.

I.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion decided an important question (principle) of law in a manner which conflicts with decisions of other United States Circuit Courts of Appeal and which conflicts with decisions of courts of the State of Illinois in reference to res adjudicata.

Defendant, in paragraph 15 of his Answer (Tr. 49 to 56) sets forth that in the suit commenced by Plaintiff in the Superior Court of Cook County against the Administratrix of the Estate of McConnell, deceased, et al., she alleged that the Release in question should be declared null and void by reason of the fact that it had been obtained from her by means of deceitful and fraudulent representations of this Defendant, said deceitful and fraudulent representations being the same as alleged in the instant case to have been made by Defendant herein, it clearly appearing that McConnell was not present at the time said representations were allegedly made; and also in said paragraph 15 of his Answer Defendant set forth the adjudication of said Superior Court of Cook County in respect to said allegations of fraud as follows (Tr. 55):

> " 'That no false or fraudulent representations were made by the said Henry V. McGurren to the said Gladys McVeigh to secure her release of the sum of Nine Thousand Dollars ($9,000.00) due and owing to her as alimony for her own support and maintenance from March 20, 1928, until April 7, 1933, the date of her remarriage . . .".

The trial court struck said paragraph 15 of Defendant's Answer (Tr. 70), the Defendant having pleaded that said findings of the Superior Court were *res adjudicata* and an estoppel to the Plaintiff to claim in this proceeding that the Defendant, Henry V. McGurren, had been guilty of the same acts attributed to him in the said Superior Court case, when said Superior Court had found that he was not guilty of those identical allegedly affirmative deceitful and fraudulent acts, the Defendant herein, in both cases being accused of being the immediate, active, tort-feasor, so that no other person could be culpable of the deceit and fraud alleged to have been perpetrated on plaintiff unless he was so guilty. And one of the points relied upon for reversal in the reviewing court was the striking by the trial court of said paragraph 15 of Defendant's Answer which set forth this defense (Tr. 382, "4"). The reviewing court in its opinion, however, makes no comment whatsoever in respect to this contention of Defendant; and in this connection it must be borne in mind that it nowhere appears in the record of this case that there were any representations made to induce Plaintiff to sign the Release in question other than or different from those alleged in the Superior Court suit; so that, if there were no fraudulent representations made to Gladys McVeigh to secure her release of what is alleged to be her individual claim, there could not have been any affirmative, fraudulent representations made in respect to any claim of the minor children which might be affected by the release, if it is true, as contended by plaintiff, that the minor children had a vested property interest under the property settlement agreement.

Defendant did, however, set up as a further defense for the purpose of showing that plaintiff-guardian was not entitled to recover damages, the fact that in the self-

same Superior Court case the Court found that plaintiff, as guardian of said minor children, was entitled to recover the sum of $8,000 from the Estate of McConnell, deceased, to be paid in due course of administration of said estate (Tr. 59). The opinion of the reviewing court says:

> "Defendant was not a party to the suit (Superior Court). Despite this fact, defendant insists that the allowance of the claim for the children for $8,000 and the finding that no false or fraudulent representations were made to plaintiff by McConnell or his representatives to secure the release and adjudging that she had released McConnell from any claims due her created an estoppel to maintain this suit. The decree discloses that as to the children the release was held ineffective." (Tr. 437.)

There is nothing in the record to show that the Superior Court so held, but even if it had so held, there was nothing in the decree and nothing is shown in the record to indicate that said Court found that the Defendant, McGurren, as to said two minor children, made any of the fraudulent, deceitful representations attributed to him. In other words, everything in the Superior Court decree is to the effect that McGurren, the Defendant herein, did not make the fraudulent, deceitful representations attributed to him in that suit (which are in fact the same representations as are attributed to him in this proceeding). The reviewing court in its opinion (Tr. 437) recognizes the principle that if an agent alone commits an act and is discharged, then in an action against his principal the principal may plead the discharge of the agent, but says that when the action is against the principal and the principal is discharged it does not then discharge the agent. And the reviewing court, predicating its decision upon this theory, refused to recognize—although it did not specifically so state—the right of the defendant to plead the findings of the Superior Court that he had not been guilty

of the self-same deceitful acts attributed to him in this cause, and also specifically refused to recognize his right to plead the finding of said Superior Court that plaintiff was entitled to only $8,000 as guardian of the two minor children, under the property settlement agreement, which said sum was to be paid out of the estate of McConnell, deceased, in due course of administration, when plaintiff alleged in the instant case that plaintiff-guardian had been damaged to the extent of a much larger sum of money by reason of the fact that her wards had been deprived of certain sums rightfully due them under the property settlement agreement by the disallowance of her claim against the Estate of McConnell by the Probate Court of Cook County predicated on the interposition of the Release as a bar thereto, which theory, however, plaintiff in fact abandoned as appears from the instructions given in this case and hereinafter considered.

The effect, however, of the reviewing court's opinion is to deprive Defendant of the right to plead the Superior Court findings that he was not guilty of the affirmative, deceitful, fraudulent acts attributed to him and to deprive him of the right to plead the judgment of the Superior Court in favor of plaintiff-guardian in the amount of $8,000 to be paid out of the estate of McConnell, deceased, on the ground that Defendant was not a party to the Superior Court proceeding and that there was therefore no privity and entire lack of mutuality. The opinion of the reviewing court in this respect conflicts with the decision of another United States Circuit Court of Appeals and also with decisions of the Courts of the State of Illinois.

It does not appear from the opinion of the reviewing court or from any other portion of the record that the alleged deceitful and fraudulent representations of De-

fendant in the instant case were anything but identical with those alleged to have been made by him in the Superior Court case; and the allegations in both proceedings show that McGurren was the active tort-feasor: that is, the one directly culpable, if the fraud were committed, and it also definitely appears from both proceedings that while McGurren was McConnell's attorney at the time the representations were made, he was of necessity also McConnell's agent.

In the case of *Portland Gold Mining Co.* v. *Stratton's Independence, Ltd. et al.*, decided by the Circuit Court of Appeals of the Eighth Circuit and reported in 158 Federal Reporter at page 63, the very able Honorable Judge Van Devanter delivering the opinion, the Court had under consideration a case in which a principal pleaded a judgment of not guilty in favor of its agent which had been rendered in a tort action against the agent, the tortious acts attributed to the principal being the same tortious acts attributed to the agent in the prior suit wherein it appeared that the principal could not have been guilty of any tortious acts unless the agent, alleged to have been the active tort feasor, were guilty. The principle of law considered by the Court in this case was not the question of mutuality or of privity, but the question of whether, when a plaintiff had in a certain proceeding contended that he was entitled to recover by reason of certain acts perpetrated by a certain active tort-feasor and where it had been found that said active tort-feasor was not guilty of those acts, the same plaintiff could maintain a subsequent action against any other party predicated on the same tortious acts of the same active tort-feasor. That is, it having once been found that the active tort-feasor had not in fact perpetrated the tortious acts attributed to him, whether the Plaintiff could in any other or different proceeding against any other or different

person recover from such other or different person, when the right to recovery must be predicated upon the self-same active tort-feasor being guilty of the tortious acts of which he has been found not guilty in a prior proceeding. This is a principle of law which cannot be varied irrespective of all the various and different facts which may surround any particular piece of litigation. And this principle of law is applicable to the instant case. In the above cited case the Court, in establishing this principle, determined that it was applicable not only to a case where the suit which was pleaded as *res judicata* or estoppel was against the agent but also in cases where the principal had been sued and where the principal could not have been found guilty but for the establishment of culpable acts on the part of his agent, and that it was proper in such case for the agent to plead in a subsequent suit against him that such was the case. The courts have recognized that an agent may so plead, and it is a bar to a suit against the agent when the principal has been discharged predicated on a finding that that same agent was not guilty of the acts attributed to him in the suit against the principal. On page 65 and 66 of the cited case, in discussing objection (2) that one may not have the benefit of an adjudication as an estoppel unless he would have been prejudiced by it had it been the other way, the court says: "But it is quite generally held that these objections do not prevent an estoppel where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think that upon principle this ought to be true." What "principle" did the court refer to? Clearly to the principle that it once having been determined in a fair, judicial hearing upon the merits that certain culpable acts had not been perpetrated by a certain party, irrespective of whether that party was

acting as an agent or as a principal, then and in that case any party claiming injury by said culpable acts of said party is estopped or precluded from again bringing an action for damages predicated on the self-same acts of the self-same party.

That the Federal Court of Appeals in the above cited case recognized this as a principle of law rather than as a pure question of whether the action was brought in the first instance against the principal or in the first instance against the agent, appears from page 66, where the Court cites the case of *Emery* v. *Fowler,* 39 Me. 326 and says, "In a prior action by the plaintiff against the father for the same act the father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication," and then quotes from the opinion in the latter case, as follows:

> "'To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others.'"

This is exactly the same principle as was contended for by the Defendant in this case. The Superior Court case pleaded by the Defendant in paragraphs 13 and 15 of his Answer was one commenced by plaintiff-sole and plaintiff-guardian in this law suit to have declared null and void the release referred to in this suit for the reason that the

same was obtained by the same allegedly deceitful and fraudulent acts of the Defendant in this law suit; and after a hearing on the merits of the case the Superior Court found that this Defendant was not guilty of the deceitful, fraudulent acts attributed to him. There is nothing in the record to show that McConnell ever had any knowledge of the fraudulent, deceitful acts attributed to Defendant in both cases. In fact there is nothing in this case that shows that at the time Plaintiff's claim was disallowed in the Probate Court, allegedly by reason of the introduction of the Release as a bar thereto, Plaintiff then contended or made the least suggestion to the Probate Court or to this Defendant that she felt the Release was obtained by fraud. Certainly she knew of the fraud at that time, if any existed, and certainly, even if it be granted, which it never has been, that she could not have had the Probate Court set aside this Release for fraud, yet had she felt that fraud had been perpetrated she could have called the matter to the attention of the Probate Court and said that she was desirous of filing a bill to have the release declared null and void by reason of the alleged fraud; and there is no court in the world that would not have given her sufficient time to prepare and file such a bill and would not have stayed denial of her claim.

The above cited case very definitely holds that it is one of the exceptions to the necessity for privity and that the primary principle is one of public policy based on the maxim, "*Interest republicae ut sit finis litium.*"

The case of *Coca-Cola* v. *Pepsi-Cola Co.*, 36 Delaware 124, 172 Atl. Rep. 260, is a case decided by the Superior Court of Delaware and as such, we recognize, is not an authority that will be considered by this Court, but we feel that no more able discussion of the question could be presented to the Court than is in said case contained and therefore we quote from said case as follows, beginning on page 262 thereof:

"In determining the question as to whether a person not a party to a prior proceeding may take advantage of the disposition of such case in a subsequent action by a plea of *res judicata* directed against any adversary who had been a party to a first proceeding, we have attempted to discover the reason for the rule 'that estoppels must be mutual or that both litigants must be alike concluded by a judgment or it binds neither.' * * * We are interested in a case where no privity is shown to exist and our duty is to determine the necessity of such privity. In 24 A. and E. Encl. (2d Ed.) 731, is given the only concrete basis for the rule that we have found. There it is said

" 'The rule that a judgment or decree concludes only parties or privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the Constitution of the several States.'

"In a great majority of cases this given reason may be satisfactory, but it is immediately apparent that it cannot always be so for it is obvious that it can have application only when the doctrine is invoked *against one* who had not been a party to the former proceeding. This reason fails when applied to one who had been a party to the former proceedings, for he had not been deprived of any due process in the presentation of his rights or claims.

"(6) The doctrine of *res judicata* is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy. The primary object of *res judicata* (public policy) is based upon the maxim *republicae ut sit finis litium*—it concerns the commonwealth that there be a limit to litigation. 2 Freeman on Judgments, Sec. 626; 38 Yale

Law Journal 299; 33 C. J. 267. Many authorities include as a basis of *res judicata* the subordinate maxim *nemo debet bis vexari pro una et eadem causa*—no one ought to be twice vexed for one and the same cause. 2 Freeman on Judgments. Sec. 626; 38 Yale Law Journal 299; 45 C. J. 1379. It would seem, however, that this latter maxim has application only when the party is 'vexed' with litigation, as a defendant, and not when, he, himself, institutes it.

"The subject of *res judicata* may generally be divided into two main and distinct classes. The first class would include those cases where there is some privity or liability over between a party to the first suit and a party to the second suit. In this group would fall cases of master and servant, principal and surety, parties primarily and secondarily liable, and other like classifications. This group would be subdivided according to the character of the privity and the manner in which the estoppel was raised, but it is obvious that the facts of the present case do not call for a consideration of this group.

"The second class of cases include those where there is no liability over, either way, between the party pleading *res judicata* or against whom it is pleaded, and any party to the prior suit. In this group, so far as the facts appear the present controversy must be placed.

"The classification now considered must, however, be subdivided. for it would seem that two distinct principles are involved

"(a) Where the plea of *res judicata* is raised by a party to the prior suit against one who was not such a party;

"And

"(b) Where the plea of *res judicata* is raised by one not a party to the prior suit against one who was such a party.

"(a) This first class of cases gives full force and scope to the historical reason of the requirement of mutuality, viz., that no person should be deprived of his property without due process of law. The person against whom the plea is made was not a

party to the former proceeding and there is no liability over either way with any person that was a party to the first suit. There is no privity, if privity be given its generally accepted meaning of having 'mutuality or successive relationship to the same right of property.' Questions under this heading could often arise when two joint tort feasors are successively sued by the same plaintiff. A holding that a judgment against the first would be *res judicata* as to the second could be sustained on no sound principles.

"(b) A very different situation arises in the case where *res judicata* is pleaded by one not a party to the first suit against one who was such a party. This is our present case.

"It is quite apparent that a direct and decisive conflict now arises between the two principles; of requirement of mutuality of estoppel on the one hand, and, on the other, the basic principle of *res judicata*, viz., the limitation to a party to one full and free opportunity to try the merits of his case.

"(7) The present defendant pleading *res judicata* was not a party to the former proceeding and the judgment in the former proceeding did not bind it so there is no mutuality. The present plaintiff, against whom the *res judicata* is pleaded is alleged to have been the unsuccessful plaintiff in the former proceedings where the issues were alleged to have been identical with those here involved. We are not now passing upon the actual existence, as a fact, of the identity of the issues in the two proceedings, for that identity must be proven. But assuming the identity of the issues, we are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. *The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and retry all the old issues each time he can obtain a new adversary not in privity with his former one.*" (Italics ours.)

It is therefore contended on behalf of Defendant that the reviewing court erred in holding that the Defendant could not plead the findings and decree of the Superior Court of Cook County to the effect that he was not guilty of the deceitful acts attributed to him being the same identical acts attributed to him in this case as the actual tort-feasor in bar to the claim of plaintiff in this proceeding, said reviewing court having predicated its opinion on the theory that Defendant could not so plead by reason of the fact that he was not a party to said Superior Court suit, and further predicating its opinion on the theory that the Defendant was a joint tort-feasor, there being nothing in the record to show that he was a joint tort-feasor. But even if he were a joint tort-feasor, it having been found in the Superior Court case that he in fact had not committed the fraud under the principles above enunciated, it was error to deprive him of the defense of *res adjudicata.*

Defendant has also said that the aforesaid rulings of the reviewing court in reference to estoppel and *res judicata* were in conflict with decisions of the courts of the State of Illinois in respect to same. As has been indicated, there is nothing in this record to show that the defendant, in this case, McGurren, was a joint tort-feasor with any other person or persons. How could he be a joint tort-feasor when, in the Superior Court proceeding against the estate of his principal, McConnell, it was found that the release was not obtained by fraud, for in the action against McConnell's Estate the relief sought must be predicated either on a separate, distinct act of McConnell, independent of this Defendant, or on a separate, distinct act of this Defendant, as agent of McConnell, or on some joint act of both McConnell and this Defendant which rendered them jointly and severally liable. There is nothing in the in-

stant case which shows that McConnell had any knowledge whatsoever of the acts attributed to McGurren. In the Superior Court case, which was against McConnell's Estate (and being against his estate any acts attributed to him would be binding on his estate), it was found that the release was obtained without any fraud; and such a finding could not have been made if there had been any fraud by McConnell or any fraud by McGurren, his agent, this Defendant; therefore, there could not possibly have been any joint tortious act and McConnell and this Defendant could not have been joint tort-feasors. Therefore, the action against this Defendant, if it can be maintained at all, must be maintained against him as a single tort-feasor and not as a joint tort-feasor with McConnell; and, therefore, the action in the Superior Court could only have been maintained on the theory of *respondeat superior.* That is, since McGurren was the agent of McConnell, McConnell was in all ways bound by and liable for any torts committed by McGurren as his agent under the doctrine of *respondeat superior.* It is a law of the State of Illinois that if the master or principal has been found not guilty of a tortious act attributed to his servant or agent and for which he would be responsible under the doctrine of *respondeat superior,* then and in that case in an action against the agent the agent may plead the fact that it has been determined that his superior is not guilty by reason of the fact that said agent had not been guilty of the acts attributed to him. The reviewing court failed entirely to recognize this principle of local law.

In the case of *Anderson* v. *West Chicago St. R. R. Co.,* 200 Ill. 329, the Court had under consideration an action in which a lessor was sued by reason of the negligence of his lessee, there being no direct negligence attributed to the lessor, and on page 333 the Court says:

> "The relation between them so far as it has reference to such damage, is not that of landlord and tenant, but that of principal and agent or master and servant. Both being liable to the party injured, such party could sue them both in the same action or sue each one separately, but if one was not guilty of the tort the other one could not be. It is not a case where the allegation is that two different parties have committed a tort to the person or property of the plaintiff and thus each one of them would be individually liable, and where it might turn out on the trial that one of the parties was innocent of any actionable wrong."

Further, the court says on the bottom of page 333:

> "It must follow, then, that if, in a suit brought against the lessor in which the tort complained of is in fact the tort of the lessee, a verdict of not guilty is rendered,—that is, that there was no actionable wrong committed against the plaintiff by the lessor—no actionable wrong could have been committed against him by the lessee in the premises, for it is the lessee's wrong that in these cases constitutes the basis of the action against the lessor."

Further, citing from *Lake Shore and Michigan Southern Railway Co.* v. *Goldberg,* 2 Ill. App. 228, the court says, on page 334:

> " 'Where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be.' "

The court then cites and quotes from *Emery* v. *Fowler,* 39 Me. 326, on page 334, the paragraph hereinbefore referred to. And, on page 339, the court says:

> "We think that both on principle and authority the judgment in the suit of appellant against the lessor of appellee is an absolute bar to his recovery in this suit."

The principles of law set forth in the foregoing cases apply to the case before the Court, for it is evident that

each of said cases, among other things, points out the absurdity of permitting a plaintiff to sue the agent of the principal when plaintiff has failed to recover in a suit against the principal predicated on exactly the same tortious acts attributed to the principal by reason of the same having been done by the agent. In each of the above cases, in order for the plaintiff to have recovered in the case which was pleaded as *res judicata* or estoppel, it would have been necessary that the plaintiff prove that defendant in the case in which said prior adjudication was pleaded was guilty of the self-same acts which in the prior case against his principal he had been found not guilty of. There is no contention in the case before the Court that McConnell was a joint tort feasor; but even if the cause of action had been sufficiently comprehensive to have established that McConnell was jointly liable with McGurren by reason of connivance with McGurren to perpetrate the fraud and deceit alleged, yet McConnell was not present at any of the conferences at which it is alleged the fraudulent and deceitful representations were made by defendant; neither is there any evidence to show that McConnell knew thereof. And so, regardless of anything which may have transpired between McConnell and defendant, prior to defendant's going to Los Angeles for McConnell which might possibly be construed as connivance; yet the state court having found that McGurren did not obtain the release by fraud, it is evident that neither McConnell nor McGurren could be held liable for said alleged fraudulent representations; for whatever may have happened between them, the finding of the state Court was to the effect that the transaction had not been consummated by reason of the fraud attributed to McGurren. Therefore, the doctrine set forth in the foregoing cases definitely applies to the case before the Court. The case of *Anderson* v. *West Chicago St. R. R. Co.*, 200 Ill. 329, above, is the law in

the State of Illinois, and the United States Circuit Court in this district is bound to follow that rule of law and not the rule of law of some other state or the ruling of a Federal Court in another state.

From all the foregoing it is evident that the refusal of the reviewing court to consider the plea of the Defendant that the Superior Court of Cook County had found him not guilty of the self-same fraudulent acts attributed to him in this proceeding was reversible error.

II.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of another Circuit Court of Appeals on the same matter in that the finding of the reviewing court, that the validity of the Release is immaterial, is tantamount to a determination by the reviewing court that the instruction in reference to the measure of damages given to the jury, although without objections or exceptions thereto, but in fact with the consent of Plaintiff thereto, was not the law of the case for the purposes of said appeal.

The reviewing court in its opinion says (Tr. 439):

> "Defendant insists that the court erred in denying his motion for a directed verdict on the ground that the children were not injured by the Release for the reason that the mother had no authority to release their rights; that as guardian she could not release the claims and that all rights under the agreement were merged in the decree of divorce, any discharge of which, to be effective would require approval by the court.
>
> "Both parties have heretofore contended at various stages that the release was invalid. This question of legality, however, seems wholly immaterial. * * * Here plaintiff, relying upon the fraud, accepted a nominal settlement."

and says (Tr. 442):

> "We have discussed elsewhere the question of immateriality of validity of the release."

It has never been contended by the Defendant that the question of the validity of the Release was in any way a determining factor as to whether or not the Defendant may or may not have made the affirmative, fraudulent, deceitful representations attributed to him but the Defendant has at all times maintained that the question as to whether or not Plaintiff-sole or the wards of Plaintiff-guardian suffered any substantial general damages by reason of the execution of said Release allegedly obtained by fraud depended entirely upon the validity of the Release to release any rights of Plaintiff-sole or Plaintiff-guardian under the Property Settlement Agreement incorporated in and approved by the decree of divorce. It must be borne in mind that the suit was brought by Plaintiff in two capacities, *i. e.*, as an individual and as the legally appointed guardian of her two minor children, being appointed on the 18th day of September, 1936, long subsequent to the execution of the Release in question, and the Court so instructed the jury (Tr. 369, "3"), and further, in connection with his charge to the jury, the court required the jury to answer two interrogatories one showing what, if any, general damages the plaintiff-sole had suffered, and two, what damages, if any, had been sustained by Plaintiff in her capacity as guardian of the persons and estates of her minor wards (Tr. 375, "22"), and the jury answered said interrogatory one by finding that the Plaintiff-sole was entitled to $4000, and answered interrogatory two by finding that the Plaintiff as guardian of the minor wards was entitled to recover for them the sum of $8500. (Tr. 376.)

The correctness of Defendant's contention that the va-

lidity of the Release must be established by the Plaintiff in order to make a recovery cannot be controverted after making a careful examination of the position taken by Plaintiff as the trial progressed and a consideration of the instruction given by the Court and assented to by the Plaintiff in respect to the measure of general damages. There was no evidence of special damages (Tr. 301) and no award of punitive damages. (Tr. 376.)

During the trial, the pertinency of any matter or thing that transpired in the Probate Court and the measure of damages applicable to the case were discussed by the court and counsel. (Tr. 183, 301, 304, 352.)

The court, on the question of general damages, instructed the jury as follows (Tr. 374) (italics ours):

> "The matter of general damages, without any intention to convey to the jury any facts in issue in this case that the general damage is recoverable in a case of this kind, are the difference between the fair and reasonable *value at the time and place in question of the claim or right surrendered, cancelled, or released* by the plaintiff *under the terms of the release in evidence*, and the amount paid her under the evidence at the time of the execution of such release."

The reviewing court also says: (Tr. 439)

> "Defendant insists that the court erred in denying his motion for a directed verdict on the ground that the children were not injured by the release for the reason that the mother had no authority to release their rights; that as guardian she could not release the claims and that all rights under the agreement were merged in the decree of divorce, any discharge of which, to be effective, would require approval by the court."

Defendant had contended in his motions directed to the sufficiency of Plaintiff's Amended Complaint (Tr. 22 to

25) that the Release was invalid as to the minor children, wards of Plaintiff-guardian, for reasons as follows:

"(2) It further clearly appears from the face of the so-called Property Settlement Agreement dated March 20, 1928, mentioned in said amended complaint and copy of which is attached thereto as a part of Exhibit 'A,' that neither of said minors, nor their said Guardian, are parties, directly or indirectly, thereto. And, since by the very terms of said agreement the monthly payments therein agreed to be contributed by Thomas McConnell for the future support and maintenance of his children, then in the custody of their mother under the terms of said agreement, are payable to her in her individual capacity alone, said moneys and the unpaid accumulations thereof cannot, as a matter of law, be recovered in an action by the guardian of said minors for their benefits.

"It will be observed that by the terms of said agreement said support money is made payable to Gladys McConnell (now Gladys McVeigh) in her personal and individual and not in any representative capacity, such as Guardian of said children. Said contract can, therefore as a matter of law, not be made the basis of an action brought for the benefit of said minors.

"(3) The release indenture mentioned in said amended complaint, and copy of which is attached thereto as Exhibit 'B,' was, (as appears from the face thereof), not signed or consented to by any party pretending, or lawfully authorized, to represent said minors as their Guardian, and by its terms (see Clause 'Second' thereof) expressly negatives any intention to thereby in anywise affect or release said Thomas McConnell from his statutory obligations under the laws of California to provide support for his minor children. Hence the execution of said release by Gladys McVeigh in her personal capacity, as a

matter of law, neither prejudiced or injured said minors in any of their supposed rights and cannot, therefore, be made the basis of any claim on their part for damages on account of the fraudulent representations charged in said amended complaint.

"(4) It further clearly appears from said release itself, and said amended complaint, that the execution of said release by said Gladys McVeigh was never authorized or approved by any court of law or equity having jurisdiction over the persons and estates of said minors, and it is, therefore, not binding upon them or their Guardian, and, so, cannot be made the basis of any right of action brought for the benefit of said minors, they not having been injured or prejudiced thereby in any respect."

Each and all of the above contentions were raised by the Defendant in his motion for a directed verdict, motion for a new trial, and motion for arrest of judgment, and as specifications of errors relied upon in the appeal. (Tr. 337, 376, 377, 380, 381, 382, 384, 385, 386.) It appears from the opinion of the Court of Appeals that said Court while realizing the contention of the Defendant that the release was invalid for the foregoing reasons, and while clearly recognizing the soundness of Defendant's position, maintained that the validity of the release was immaterial and that therefore it could not affect the rights of plaintiff-sole or the rights of plaintiff-guardian to recover predicated on the alleged deceitful representations. Defendant has at all times contended that under the instruction above referred to it was imperative that the plaintiff establish that the release was valid and that plaintiff did on the date of the execution of said release and for the consideration therein mentioned, effectually release all rights or claims that she had as an individual, plaintiff-sole, and all rights and claims that her said two

children had under the property settlement agreement, and that her damage sole and the damage to the estates of her two children which she might recover as guardian of their estates was the difference between the value of what plaintiff-sole and plaintiff-guardian and each of them there and then parted with and the consideration that they received under the release on the date of the execution thereof. It is pertinent at this point to call the Court's attention to the fact that Defendant at all time has contended that the Release did not in fact release any vested rights of the children in the property settlement agreement or decrees of divorce incorporating the same.

In the case of *F. W. Woolworth Co.* v. *Carriker,* 107 Fed. 2d 689, (C.C.A. 8th Circuit), the Court in its opinion says, on page 692:

> "A general verdict of a jury is the composite result of the facts found by the jury and the law as given to the jury in the charge. Where there are no exceptions to a statement as to the law in the charge, this Court has repeatedly held that such statement becomes the law of the case for purposes of an appeal. * * * Plaintiff made no exceptions to the charge. Defendant made several exceptions to the charge but makes no challenge of the charge here. As to this Court on this appeal, the effect is the same as though no exceptions had been taken to the charge; therefore the charge is the law of the case as to this appeal."

In the case of *Skaggs Safeway Stores Inc.* v. *Dunkle,* 49 Fed. 2d. 169, (C.C.A. 8th Circuit) the defendant, on appeal, argued that the evidence showed that plaintiff had been guilty of contributory negligence. As to this, the Court says, page 172:

> "Accepting this contention as a proper statement of the law, it is not available to the defendant here,

> because the court specifically instructed the jury that there was no evidence that plaintiff was guilty of any contributory negligence after the time that his truck got into the pathway of the defendant's car, and this instruction, as has already been observed, was not excepted to. There is therefore no question of concurrent negligence presented by this record."

The instruction referred to by the Court appears on page 171, first column, as follows:

> " 'There is no evidence that Mr. Dunkle, the plaintiff, was guilty of any contributory negligence after the time that the Ford truck got into the pathway of automobiles going east on Holdrege Street. So you are to eliminate all question of whether or not the plaintiff was guilty of contributory negligence. * * *' "

On the same page, at the bottom of that column, there is another instruction referred to, which we are not interested in, and then the Court says:

> "(1-3) These instructions, not having been excepted to, became the law of the case. * * *"

In the case of *Kurn* v. *Stanfield,* 111 Fed. 2d 469, the Circuit Court of Appeals for the 8th Circuit had occasion to consider an instruction which was given by the court to the jury, and on page 474, the court says:

> "But we are not required to consider the point here. The record shows that the court told the jury in the charge that the amount to be assessed as damages was limited by the amount prayed for in the petition, to-wit $60,000. The trustees were then given opportunity to object to the charge, but found no fault with this part of it. The declarations of the charge to which no objections were taken became the law of the case for purposes of an appeal."

It has long been the law that when a case by mutual consent has been tried on a certain theory that neither

party can object in the reviewing court to evidence or instructions which have been given to the jury predicated on that theory. In the case of *San Juan Light Co.* v. *Requena,* 224 U. S. 89, on page 97, the court says:

> "Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, the court among other things discussed the effect of argument during the trial of the case and briefs of counsel which in effect recognize a certain hypothesis, and on page 435, the court says:

> "In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such."

The instruction referred to became the law in this case, as it was assented to by plaintiff, as indicated (Tr. 183). It therefore became incumbent upon plaintiff in this suit to establish as a matter of law and fact, among other things: (1) that the affixing of the signature "Gladys McVeigh" to said release was done with such authority and right that the same did in law and in fact release the vested rights of the minor children in the decrees of divorce incorporating the agreement and the agreement;

and (2) that the release is subject to the construction that it is an effective release of the vested property rights of said minor children in the decrees of divorce incorporating the agreement, if said children had any such vested property rights.

Under the foregoing instruction the jury found general damages suffered by the said minor children, which plaintiff in her capacity as their guardian was entitled to recover, in the sum of $8,500 (Tr. 376). Therefore, the jury must have found that the said sum of $8,500 represented the difference between the value of the rights of the children under the decrees of divorce incorporating the agreement and the amount paid plaintiff under the release, namely $1,250; and no part of said $8,500 was allowed for any other kind or character of damages. In other words, that by the execution of the release the two minor children, wards of plaintiff-guardian, suffered general damage in the sum of $8,500.

If the release was not effective by reason of either proposition "(1)" or "(2)" above set forth, the execution of the same by plaintiff, Gladys McVeigh, and by this Defendant as agent for McConnell, became absolutely immaterial and of no effect whatsoever as far as the said children, wards of plaintiff-guardian, were concerned; and it was immaterial whether the execution of the same was procured by fraud of this defendant or otherwise.

The theory of this case presented by the instruction aforesaid and upon which the case was tried was not that plaintiff could not have suffered any injury by reason of any alleged deceitful acts of defendant, but that the only damages that plaintiff was entitled to recover under the instruction given by the court to the jury, and the only damages that the jury under said instruction could

consider or possibly award to the plaintiff were such damages as came within the strict provisions of the instructions.

We have heretofore referred to the instruction given by the court and assented to by plaintiff as to what the measure of general damages should be. We have also referred to the special instructions given to the jury directing them to determine what general damages, if any, had been sustained by plaintiff-sole and what general damages, if any, were recoverable by plaintiff as guardian on behalf of the estates of the two minor children.

Under the instruction the reviewing court could not consider as an element of damages in this law suit any damages except such as were clearly within the purview of the instructions given and the theory upon which plaintiff tried her law suit in the trial court. And the reviewing court, in holding that the question of the validity of the Release was immaterial, in effect failed to recognize the principle of law enunciated by the Circuit Courts of Appeal and above referred to.

The refusal of the reviewing court to consider the case on the above basis, was an error causing grave prejudice to the defendant. Especially is this true as the trial court had taken the position, in which plaintiff's attorney concurred, that what transpired in the Probate Court and whatever monies were in the Probate Court had nothing to do with the question of damages suffered by plaintiff, either sole or guardian. This worked an extreme injustice to defendant, which can be fully ascertained only by an examination of proceedings in the trial pertinent thereto, the same being as follows:

On January 17, 1940, the witness Lloyd Faxon was called on behalf of plaintiff (Tr. 147) and over the objection of counsel for defendant testified that the Release in

question was handed to the Probate Court by the defendant with the statement that it was a Release and a bar to the claim filed by Gladys McVeigh (plaintiff); that there was no other evidence or testimony at said hearing in the Probate Court; and that the said claim was disallowed by the Probate Court. Thereafter, on January 18, 1940, in the afternoon session of the trial court, during the plaintiff's case-in-chief, there was under consideration a stipulation in regard to the value of certain property owned by McConnell during his lifetime, which stipulation did not, however, indicate the ownership of said property by McConnell on March 18, 1935, the date of the execution of the Release. (Tr. 180.) Defendant objected to the introduction of said Exhibit because it did not show that McConnell owned said property on the date of the execution of the Release (Tr. 182), defendant contending that each and every fact set forth in said stipulation was immaterial and irrelevant and in no way binding upon the defendant; and in connection therewith the following discussion was had:

> "The Court: As to the securities you have on March 18th, and up to that time, July 31st, August 3rd, you have the value of the shares or certificates left. You have the value at that time and then the value on March 6th. I don't take it that it is of any consequence what the value might have been on other dates on counsel's theory of the case. It is what he had when it is claimed these representations were made.
>
> "Mr. Healy: That is the measure of damages.
>
> "The Court: I take it that must be the measure of damages.
>
> "Mr. Healy: Oh, that is the measure of damages.
>
> "The Court: So I will let it all go in. It is a question for the jury." (Tr. 183.)
>
> "Mr. Soelke: All right. Then you remember in the early history of the case there were motions made to strike on the ground of misjoinder of parties, and

at that time your Honor ruled, under some special rule relevant to that, regardless of what the pleadings were, it depended upon proof, and that your disposition with reference to that matter was subject to the whole thing being presented to the court on the trial, and if at that time it appeared there was no interest that the plaintiff could prove and establish, then you would entertain a motion to dismiss that claim out of the case. Wasn't that about it?

"The Court: * * * You (Mr. Soelke) may bring in your written motion tomorrow morning. I will regard it as though it were filed today." (Tr. 184.)

From the foregoing it appears that plaintiff definitely adopted the theory of damages in this case set forth in Instruction No. 20 (Tr. 374) before she rested. The theory of damages is a highly important element in actions of fraud and deceit and in order to recover in an action for fraud and deceit not only must there have been deceitful representations made, but they must have been made knowingly and with intent that the other party should act upon them and, further, they must have been acted on by the other party in such a manner as to cause the other party damage. It is therefore self-evident that no matter how deceitful the representations may have been intended to be, or how strong the intent was that the other party should act thereon, yet if the representations were in fact true, then there can be no action for damages as one of the primary elements of an action of deceit is lacking. And it further follows that, if there is a fraud and deceit, but the fraud and deceit does not result in damage to the other party, then and in that case also one of the primary elements of an action or cause for deceit fails. And it is respectfully contended by defendant that the plaintiff, both sole and guardian, having predicated her case upon the measure of damages theory referred to, fails to prove any damage and also fails to prove one of the primary elements of her cause of action unless said

RELEASE was valid and efficacious to and did in fact release all rights of plaintiff-sole and/or rights of plaintiff-guardian, if any, on the date of its execution—from which date it must have been efficacious, if it were ever at any time efficacious—in the property settlement agreement as incorporated in the decrees of divorce. There is no ambiguity in and no ground for enlarging upon or restricting Instruction 20 in reference to the measure of general damages. The measure of general damages is clearly and specifically "the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, cancelled, or released by the plaintiff under the terms of the release in evidence, and the amount paid her under the evidence at the time of the execution of such release" (Tr. 374).

The prejudice to Defendant by this position of the reviewing court is further apparent when considered with the fact that the Defendant specifically pleaded that the release in question was not the ground upon which the Probate Court disallowed the claim of Plaintiff therein and also contended that the Plaintiff never filed a claim in the Probate Court in any representative capacity on behalf of the two minor children. In paragraph 13 of his Answer to the Amended Complaint of Plaintiff (Tr. 42 to 48) Defendant set forth in full the defenses raised by the Administratrix of the Estate of Thomas McConnell, deceased, to the claim of Plaintiff filed in said Estate. On motion of Plaintiff that said paragraph 13 "contains matters wholly immaterial and foreign to the proper issues herein in pleading verbatim the objection and answer of Ruth T. McConnell, individually and as administratrix to the claim of Plaintiff in the Probate Court of Cook County, Illinois" (Tr. 61); the Court struck said paragraph 13 of Defendant's Answer (Tr. 70); and this notwithstanding the fact that Plaintiff, in paragraph 13 of her Amended

Complaint, had pleaded that "but for said fraudulently obtained release * * * she had a clear and incontestable claim in her own behalf and as guardian of the persons and estate of Thomas McConnell and Charles Dewey McConnell, minors, in an amount of Twenty-five Thousand Dollars" against the Estate of Thomas McConnell, deceased (Tr. 19, 20). Clearly this allegation of the Plaintiff made pertinent the setting forth in Defendant's Answer of the various defenses raised by the Administratrix of the Estate of McConnell to the allowance of Plaintiff's claim in said Estate, not as evidence of the facts therein set forth, but as evidence that other defenses than the RELEASE in question had been raised.

The Court, having refused to allow the Defendant to plead anything that transpired in the Probate Court on the contention that it was immaterial and irrelevant, although Plaintiff had pleaded in her complaint that her claim in the Probate Court had been disallowed solely by reason of the interposition of the release in question and had introduced evidence in support thereof; and the Court, subsequent to the introduction of said evidence by Plaintiff, having refused the offer of the Defendant to show that the Plaintiff was put on full proof of her claim in the Probate Court (the Court holding that such evidence was immaterial and irrelevant, Tr. 302 and 304), did thereby deprive the Defendant of the opportunity to rebut the evidence and contention of the Plaintiff that her claim in the Probate Court had been disallowed solely because that release was held as a bar thereto. However, all this became and was immaterial, as held by the Court, in view of the position taken by counsel for Plaintiff and by the Court and in view of the instructions given by the Court to the jury, for, as heretofore stated, under that instruction what happened in the Probate Court was immaterial; and it cannot be argued that the validity of the release

was immaterial simply because Defendant presented the same as a bar to Plaintiff's claim in the Probate Court.

Plaintiff's cause of action as presented to the jury was not predicated on damages caused by the interposition of the RELEASE in the Probate Court but was predicated on damages suffered by reason of the fraud and deceit within the purview and only within the purview of the instruction given. The position taken by counsel for Plaintiff, and the rulings of the Court that what transpired in the Probate Court was immaterial, and the refusal of the Court, on that ground, to permit the Defendant to present any evidence as to what happened in the Probate Court, would have been highly prejudicial to the Defendant had any other instruction been given to the jury than one which excluded from the consideration of the jury the question of damages arising out of the presentation of the RELEASE as a bar to the claim of the Plaintiff in the Probate Court; and it is not an answer to that proposition for Plaintiff to contend, or for the court to hold, that if the RELEASE were obtained by fraud the presentation of the same in the Probate Court as a bar to Plaintiff's claim therein brought the fraud to fruition. It was immaterial whether or not the release was obtained by fraud and whether the RELEASE in itself might have been a bar to the claim of the Plaintiff in the Probate Court if there were other reasons presented to the Probate Court why Plaintiff's claim should not be allowed therein; and if the Court had held that the matters and things that happened in the Probate Court in reference to said release were material then it was material and proper for the Defendant to show that the claim in the Probate Court was not disallowed by reason of the interposition of the release, or was disallowed for other reasons also, for, if it were disallowed for some other reason, then it could make no difference whether or not the release was inter-

posed and whether or not it was fraudulent. As a matter of fact, it clearly appears that had the Court permitted the Defendant to show the objections of the Administratrix of the Estate of Thomas McConnell, deceased, to the claim of Plaintiff in the Probate Court, and to introduce the same in evidence, it would appear that the claim in the Probate Court would have been disallowed irrespective of the release, because the Administratrix denied that the Estate was indebted to the claimant and put her upon strict proof. This proof the record clearly shows she did not make, as Lloyd Faxon, Plaintiff's own witness, in his testimony herein says that the only evidence or testimony at the hearing in the Probate Court was the presentation of the release (Tr. 157); and there was then and at that time, in full force and effect, a statute of the State of Illinois which is in words and figures as follows, to-wit:

> Illinois Revised Statutes—Administration of Estates —Claims against estates: * * * when and where such claimant shall produce his claim in writing; and if no objection is made to said claim by the executor, administrator, widow, heirs or others interested in said estate, and the claimant swears, that such claim is just and unpaid, after allowing all just credits, the court may allow such claim without further evidence, but if objection is made to such claim the same shall not be allowed without other sufficient evidence. * * * (1937 Ill. Revised Statutes, State Bar Association Edition, Chapter 3, Par. 61, Sec. 60.)

This statute was interpreted in *Kingan & Co., Ltd.* v. *Estate of Burns,* 104 Ill. App. 661, and applied in disallowing a claim because it was not supported by "other sufficient evidence" after objections to the claim had been filed.

It therefore appears that but for the position taken by Plaintiff in this law suit, that what transpired in the Probate Court was immaterial, the Defendant could have established, by simply introducing the objections filed in said court by the Administratrix of the Estate of Thomas

McConnell, deceased, to said claim of the Plaintiff therein, that the Probate Court would have disallowed said claim irrespective of the presentation of the release, and this without taking into consideration the other evidence which, had it been considered material and pertinent, the Defendant could have presented to the trial court to show that the claim in the Probate Court was disallowed for reasons other than the introduction of the release as a bar thereto. Of course, after the successive positions of the trial court and counsel for plaintiff that such happenings were immaterial, and upon its appearing that the basis of damages and the instruction to the jury in that respect would be of the character as was in fact given to the jury, the Defendant naturally rested his case.

The highly prejudicial position of the Court of Appeals in failing to recognize that they are bound by Instruction No. 20 (Tr. 374) given to the jury in reference to the measure of damages, further appears from the fact that not only did Defendant in paragraph 13 of his Answer set forth, among other objections of the Administratrix to the allowance of the claim of Plaintiff in the Probate Court, the contention of the Administratrix that the allowance of said claim, predicated on the property settlement agreement and/or the decrees of divorce incorporating the same was contrary to public policy of the State of Illinois (Tr. 44 "8"), which said portion of Defendant's Answer the Court struck on the basis that the same was immaterial and irrelevant; but Defendant also, in Paragraph 18 of his Answer (Tr. 58) set forth that the allowance of the claim of Plaintiff in the Probate Court predicated on said property settlement agreement as approved by and incorporated in the decrees of divorce out of the Estate of McConnell, the property being located in the State of Illinois, would have been contrary to public policy of the State of Illinois, which said portion of

Defendant's Answer the Court also struck on the theory that the gist of the action is fraud and deceit and "it is no defense to allege that the release is invalid, or was not validly executed, or that it is against the public policy of the States of California or Illinois" (Tr. 68). This position of the Court was taken before the case was in fact at issue and long prior to the trial of the case, the making of the various statements hereinbefore referred to as to what was the measure of damages, and the giving to the jury of Instruction 20 as to what was the measure of damages.

From all that we have said, it must definitely appear that the only way that the jury could assess damages under the instruction given by the Court was on the theory that the release was valid and efficacious to release any vested rights of plaintiff-sole and/or plaintiff-guardian under the property settlement agreement approved by and incorporated in the divorce decrees. It is evident that in the first instance Plaintiff predicated her cause of action on the theory that the Probate Court had disallowed the claim on the basis of a valid release which had been in fact obtained by fraud, but that during the trial of the case, and before its termination, Plaintiff entirely switched her position and predicated her theory of damages exclusively upon the basis of damages as set forth in Instruction 20 (Tr. 374).

III.

The United States Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in respect to the establishment of claims in the Probate Court in the State of Illinois.

The Defendant in Paragraph 15 of his answer set forth the written objections filed by the administratrix of McConnell's estate in the Probate Court, objecting and contesting the claim of the Plaintiff (Tr. 42). The trial court sustained the motion of the Plaintiff that the same was immaterial (Tr. 63). The reviewing court affirmed this ruling. The Defendant during the trial offered in evidence (Tr. 302, 304, 352, 353) the objection of the administratrix filed in the Probate Court which has heretofore been referred to wherein she demanded strict proof of the Plaintiff, the claimant in said court, of each and all material allegations in support of such amounts as she claimed due her. The trial court sustained the objection of the Plaintiff to the acceptance of the same in evidence. The Defendant's attorney called to the attention of the trial court and the attorney of the Plaintiff that under the rule in respect to establishing claims in the Probate Court when objections are made thereto by the representative of the estate full proof thereof must be made. The Plaintiff had presented her alleged amended claim (Exhibit 5) over objection of counsel for Defendant, and then as heretofore in a prior point referred to, placed the witness Faxon, her attorney in said probate proceeding, on the stand, and he, over objection of the Defendant, testified in respect to the

presentation of the Release in evidence to the Probate Court as follows (Tr. 157):

> "Q. Was there anything else heard in the way of testimony or evidence by the court at that hearing?
> (Objection by Mr. Soelke; objection overruled.)
> A. There was no testimony whatsoever.
> Q. Was there any other evidence?
> (Objection by Mr. Soelke; objection overruled.)
> A. No other evidence."

Plaintiff offered in evidence order of the Probate Court disallowing the Plaintiff's amended claim, being Exhibit 6 (Tr. 156) to which Defendant objected. The offer was in fact made at a prior session (Tr. 148), and it was objected to: "Mr. Soelke: I object to this as incompetent, irrelevant and immaterial." There was a discussion of the admissibility of the claim and the order, and counsel for Plaintiff said (Tr. 149) that he wanted to show "that this defendant, acting as attorney at this time for Ruth McConnell, the widow and administratrix, himself interposed (the release) before that Court, and it was the sole and only matter heard by the Court in the way of evidence."

We have heretofore called attention of the Court to the statute of the State of Illinois and the rule which sets forth the procedure which must be followed by a claimant in establishing a claim in the Probate Court of Illinois when, after the claim has been filed, it has been objected to: that is, claimant must make due and full proof of the claim by material and competent evidence given by a competent witness. It therefore appears that that portion of Defendant's Answer which sets forth what transpired in the Probate Court, and the offer of the Defendant of evidence of the fact that the Administratrix of the Estate of McConnell made specific objections to Plaintiff's claim and put claimant on strict proof of the

claim, were exceedingly material—not from the standpoint of evidence of any matter or thing contained in said objections, but from the standpoint of showing that plaintiff's claim was not denied by the Probate Court solely on the ground that the release was a bar thereto, and also for the purpose of showing that Plaintiff had not made proper proof of her claim in the Probate Court and that the order of the Probate Court denying same was proper for that reason. If it was material to Plaintiff's case to establish that her claim in the Probate Court had been disallowed solely on the ground of the interposition of the release as a bar thereto, then it was equally as material, if not more material, that the Defendant be given the right to plead and show that it was disallowed on some other ground; for if it were disallowed on some other ground then it became entirely immaterial on any theory of the case whether or not the release may also have been held as a bar to said claim by the Probate Court. The only deduction that one can make from the opinion of the reviewing court is that it determined, contrary to the statute of the State of Illinois governing the procedure for establishment of a claim in the Probate Court when same has been objected to, that it was not necessary to introduce evidence to prove the claim and that the filing of the claim in the Probate Court was of itself sufficient, even when the claim was objected to. In this, the defendant maintains, the reviewing court erred.

Counsel for Defendant, during the trial of the case, called attention to the fact that when objections were filed to a claim in the Probate Court then the claimant must make proof in open court, and also called attention to the fact that there was no proof introduced by plaintiff as claimant in the Probate Court (Tr. 302, 303).

IV.

The opinion of the Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a manner probably in conflict with applicable local decisions, in that it determined that when a case is predicated upon affirmative, fraudulent, deceitful representations it is not necessary that the same be proved by a clear preponderance of the evidence.

While it appears that there was a conflict in the evidence as to whether or not the Defendant, McGurren, made the affirmative, fraudulent, deceitful representations attributed to him; yet we have shown that as to the first meeting, at the Hollywood Hotel, there was only the testimony of the plaintiff and the defendant, no other parties having been present, that as to the conference at the City Prosecutor's Office on March 15th, there is the testimony of Defendant and two corroborating witnesses, while plaintiff under oath absolutely denies that there was any such conference held, maintaining that the conference on that date was the one at the Hollywood Hotel and that she had no conference at the Prosecutor's Office except the conference of March 18th at which the release was executed (and there can be no question, after considering the evidence, but what the plaintiff deliberately avoided admitting that there was a first conference in the Prosecutor's Office on March 15th); and that, as to the conference at the City Prosecutor's Office on March 18th, there is the testimony of Plaintiff, which is somewhat substantiated by the testimony of her attorney Ham, in respect to the alleged deceitful representations of Defendant and there is the testimony of Defendant, denying that he made the said deceitful representations, which is substantiated by the testimony of two other witnesses.

It is interesting to note that the fee of $500 paid McGurren by McConnell for going to Los Angeles for him was very small (Tr. 220) and also that defendant, McGurren, had no financial interest in McConnell's property or estate and has no interest in the outcome of this litigation other than to protect himself against the assessment of damages. On the other hand, Plaintiff, if she were successful, could expect to receive a very substantial sum of money. Cases of this character are quasi-criminal in aspect; and while there may be many decisions in cases of this kind where the question as to whether mere preponderance of the evidence is sufficient is not raised, we know of no carefully adjudicated case where mere preponderance of evidence has been held sufficient to sustain a verdict finding the defendant guilty of fraud and deceit of this character.

Defendant requested that the Court give an instruction as follows:

> "The jury, however, is further instructed that they are not to assume from anything said in these instructions by the Court in reference to the subject matter of damages that the Court intends to convey the idea, as a matter of fact, that damages have in fact been sustained by the plaintiff. On the contrary, if the jury should find the issues for the defendant: that is, if the plaintiff has failed to prove *clearly to the satisfaction of the jury* by a preponderance of the evidence that the statements alleged were not made, or if made were not false, or if falsely made were not relied upon by the plaintiff and that she was not deceived thereby, then, under such conditions, it will not be necessary for the jury to consider the matter of damages at all" (Tr. 347, "VII").

The Court gave said instruction but eliminated therefrom the words which we have italicized, namely, "clearly to

the satisfaction of the jury." Defendant also asked an instruction as follows:

> "The Court further instructs the jury that the burden of proof is upon the plaintiff in this case to prove by a *clear* preponderance of the evidence her said claims and contentions *above mentioned; that is to say,* it is incumbent upon the plaintiff to prove by a *clear* preponderance of the evidence each of the following propositions:
>
> "1. That the statements, or some one of them, above mentioned were made by the defendant to her at the time and place in question.
>
> "2. That such statement or statements, if any, so made, if they were made, by the defendant to the plaintiff, were then and there false and untrue.
>
> "3. That the defendant then and there knew, but that the plaintiff did not know then and there, that the said statement or statements, if any, were false and untrue.
>
> "4. That the plaintiff then and there relied upon such statement or statements, if any.
>
> "5. That the plaintiff so relying, if she did *so rely* on such statement or statements, if any, was injured.
>
> "And if the plaintiff fails to prove any of the foregoing propositions by a *clear* preponderance of the evidence in this case, then it is your duty to find a verdict for the defendant" (Tr. 344, 345, "III").

The Court gave said instruction, but with the italicized words eliminated therefrom.

Defendant contends that in a case of this nature he was entitled to have the above instructions given as requested by him, and further contends that the instructions as given by the Court with the italicized words eliminated were tantamount to telling the jury that mere preponderance of the evidence is sufficient. This is contrary to the law of the State of Illinois. In the case of *Carter* v. *Carter,* 283 Ill. 324, the Supreme Court of Illi-

nois had under consideration an action for wilful fraud and deceit and, on page 332, in discussing the matter, the court says:

> "All transactions are presumed to be fair and honest until the contrary is proved. Fraud will not be presumed, but must be proved as a fact by such clear and convincing evidence as leaves the mind well satisfied that the allegations of fraud are true," citing *McKenna* v. *Mickelberry*, 242 Ill. 117.

The Supreme Court of Illinois has also passed upon the same question in the case of *Shinn* v. *Shinn*, 91 Ill. 477, where the court had before it a bill which alleged William and Mary Ann Shinn had by fraud obtained an interest in certain real estate, and received benefits to which plaintiff was entitled, and asked for an accounting. On page 486, the court says:

> "But something more than suspicions are required to prove an allegation of fraud. The evidence must be clear and cogent, and must leave the mind well satisfied that the allegation is true.
>
> "In the face of all the evidence in this case, we cannot say that we are so satisfied."

CONCLUSION.

It is respectfully submitted that this Honorable Court should grant the writ of certiorari prayed for in the petition for each and all the various reasons set forth in I to VII, inclusive, on page 13 of the petition for the writ, predicated on each and all the errors hereinbefore set forth in the argument, and further respectfully submits that the judgment of the Circuit Court of Appeals for the Seventh Circuit (Tr. 443) should be reversed, and that said cause should be certified to this the Supreme Court for determination by it with the same power and authority and like effect as if the cause had been brought there by unrestricted writ of error or appeal.

Respectfully submitted,

By CHARLES H. SOELKE,
Counsel for Petitioner.